No. 82-1108

Supreme Court, U.S.
FILED
JAN 19 1983
ALEXANDER L. STEVAS
CLERK

IN THE

# Supreme Court of the United States

October Term, 1982

BENJAMIN SIEGEL,

*Petitioner,*

*v.*

THE STATE OF NEW YORK and EDWARD J. KURIANSKY, Deputy Attorney General for Medicaid Fraud,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## PETITIONER'S REPLY BRIEF IN SUPPORT OF CERTIORARI

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No. 82-1108

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BENJAMIN SIEGEL,

Petitioner,

-- against --

STATE OF NEW YORK and
EDWARD J. KURIANSKY, etc.,

Respondents.

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## PETITIONER'S REPLY BRIEF

Respondents' opposing brief in a number of separate ways confirms, it does not refute, the need for review in this case:

First, the essential infirmity with both the Panel ruling below and the opposition brief, is that, if there were the

New York "statute of frauds" plea bargain rule they assert, it would be unconstitutional, in violation of Santobello (404 U.S. 757), Blackledge (431 U.S. 63), and Boykin (395 U.S. 238). Due process requires enforcement of a prosecutor's promise which induces a plea, especially, as as here, where that bargain not only is uncontradicted by the record but has been proven at a hearing actually held.* At a

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* The opposing brief (at 21), like the deciding Panel below (Pet. App. A at 15a), moreover incorrectly suggests that petitioner "knew or should have known" of the newly created "statute of frauds" for plea bargains applied for the first time in this case. As we have shown (footnote at p. 8 of Pet.), there was no such rule. This is further demonstrated in this very case by the fact that it was unknown to the Queens County trial court (Pet. App. C), to the unanimous five member Appellate Division (Pet. App. D), to District Judge Sweet (Pet. App. B), and indeed (before this case) to the Second Circuit itself when, in Palermo v. Warden of Greenhaven Prison, 545 F.2d 286 (2d Cir. 1976), stating that prosecutors must be held to "meticulous standards of both promise and performance," it affirmed the enforcement of an oral off-the-record plea bargain.

minimum, in light of the failure of the allocution record in this case fully to demonstrate its voluntariness, petitioner was entitled to a hearing, denied him by the final state rulings and the Second Circuit, whether to vacate his plea.

Second, respondents incorrectly attempt to create factual issues when there are none. To do so they (a) misleadingly and selectively quote the state court hearing transcript in a way which distorts its actual contents and (b) omit to note that they made these very same arguments in the state trial court, in the appellate division, and again in the district court. In rejecting these contentions, including the baseless and false assertion that the plea bargain proven in this case was "concealed" from the sentencing court, these fact-finding courts did not accept respondents' version of the facts (see, e.g., Pet. App. C at

38a). Petitioner's Statement of the Case, in contrast, relies solely on the unrebutted factual statements in his moving papers below and in the opinions of the three fact-finding courts in this case. See Pet. Apps. B, C, and D.

Third, respondents assert by fiat (Resp. Br. at 34), not reasoned argument, that Sumner v. Mata, 449 U.S. 535, does not apply. But Sumner teaches that in a Section 2254 case the federal court may not circumvent state court factual findings by the expedient of relabeling questions of fact as questions of law -- yet that is precisely what the Second Circuit did below.*

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* Nor is it true, as the prosecutor states (Resp. Br. at 26), that petitioner had not fairly presented his claims to the state courts. This submission ignores petitioner's N.Y. CPL Article 440 motion, based on his unrebutted affidavit testifying to his reliance and to the in-

[Footnote continued on next page:]

Fourth, respondents' brief, implicitly premised as it is on the unconstitutional and inequitable notion that the prosecutor unilaterally may abrogate an agreement he made, is further inappropriate because its claim of prejudice seriously misrepresents the true facts of his recent request for further testimony from

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[Footnote cont. from p. 4:]

voluntariness of the plea if the bargain were not upheld (Appendix below at AA43), to withdraw his plea among other things because of the ambiguous allocution record's failure to satisfy Boykin, but the state denied him a hearing. See Pet. at p. 7 and App. G. See also Suggs v. LaVallee, 570 F.2d 1092, at 1117 (2d Cir. 1976).

In light of petitioner's request in the district court for this alternate relief, foreclosed by the Panel below (see Pet. App. A at 15a), the most the prosecutor's desperate attempt to create factual issues shows is how wrong it was for the Panel to order a dismissal before the district court at the least held a full hearing to resolve respondents' non-record contentions.

It should not be forgotten that this is a request to review a final judgment dismissing the petition/complaint on a pre-answer appeal from a preliminary injunction.

petitioner. Because these misstatements are aggravated by the circumstance that these "facts" are nowhere in the record, however, we will refrain from demonstrating their falsity. It suffices to note that respondents made essentially the same argument in opposition to petitioner's App. Rule 41(b) motion below for a stay pending this Court's action on his petition for certiorari, but the Second Circuit nonetheless granted the stay.

## Conclusion

The petition should be granted.

Respectfully submitted,

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January 18, 1982